SOO BOON KOOI & ORS A

v.

SOO BOON SIONG

COURT OF APPEAL, PUTRAJAYA B
MOKHTAR SIDIN JCA
LOW HOP BING JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: P-02-10-1996]
19 SEPTEMBER 2007 C

CIVIL PROCEDURE: *Injunction - Interim injunction - Principles applicable - Issues to be tried - Status quo - Damages - Balance of convenience - Whether case established for granting of order of injunction*

D

This was an appeal by the appellants against an Order of Injunction obtained by the respondent restraining the appellants from, amongst other things, determining his authority, powers, rights, entitlements, interests, benefits and privileges whether as governing director, director or shareholder of the appellant companies and from transferring and/or disposing of the assets and funds of the appellants. The appellants' appeal was only against para. i(d) of the Order of Injunction *ie*, restraining the appellants from 'terminating or attempting to terminate, withholding, suspending and/or curtailing in any way the monthly salary, fees, expenses, entitlements, benefits enjoyed by or due to the respondent, as governing director, director, shareholder or otherwise, as the case may be'. The essential issue to be determined was whether the respondent had made out and established his case for an Order of Injunction pending trial, following the criteria as laid down in the case of *American Cyanamid Co v. Ethicon*. E F G

Held (dismissing the appeal)
Per Mokhtar Sidin JCA delivering the judgment of the court: H

(1) The respondent's monthly salary, fees, expenses, entitlements and benefits would appear to extend to beyond salaries or wages payable in a strictly employer-employee relationship, having regard to the respondent's assertions on affidavits affirmed on 10 July 1995 and 4 October 1995 in support of his summons in chambers for an interlocutory injunction. I

A Consequentially, damages would not be an adequate remedy, more so in view of the respondent's assertions on affidavit affirmed on 10 July 1995. The truth or veracity of the assertions on affidavits on the part of the respondent, including the assertions that the companies were incorporated
B for the purposes of tax savings and to complement and/or take over, if needed be, the business activities of the partnership and that the share equity in the companies as between the respondent and the 1st appellant shall be on an equal basis consistent with their shares in the partnership, were strictly
C issues to be addressed at the trial. Likewise, the denials or contentions of the appellant on affidavits, including the contentions that the respondent had not been taking any part in the business of the companies or had breached his fiduciary duty as a director, were matters to be addressed at the trial.
D (paras 9, 10 & 11)

(2) The appellants' complaint that para. i(d) of the Order of Injunction was highly prejudicial to and onerous on the appellants and their compliance under threat of committal
E proceedings would appear to have been exaggerated, given the fact that the Order of Injunction was intended to preserve the *status quo*. Besides, the appellant's complaint or concern had incidentally been addressed in para. i(f) of the Order of Injunction *ie*, that 'the order shall not prohibit, restrain or
F restrict the defendants from effecting payments in the ordinary course of business'. The issue of damages for any injury or inconvenience that may have been suffered by the appellants may have to be addressed, if at the conclusion of the trial, the judge should find that the Order of Injunction ought not to
G have been granted. It would then be up to the respondent to argue his contention that the appellants had by their defence dated 3 August 1995 agreed in effect to resume payment of his salary without the need for a restraining order. For the purposes of the appeal, damages would not be an adequate
H remedy. If, at all, there were any doubt, the balance of convenience would nonetheless appear to favour the respondent, more so when no reason had been stated in the very letter dated 3 July 1995 from the 2nd appellant informing that payment of salary and all other expenses shall cease with
I effect from 1 July 1995. (paras 12, 13 & 14)

(3) In the circumstances, the respondent had made out his case for an interim injunction in the terms of the Order of Injunction, pending trial of the matters in dispute. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu-perayu terhadap suatu Perintah Injunksi yang diperolehi oleh responden yang antara lain menghalang perayu-perayu dari melucutkan autoriti, kuasa, hak, kepentingan, faedah dan keistimewaan-keistimewaan responden, termasuk autoriti dalam memindah dan/atau melupuskan aset-aset dan dana perayu-perayu, sama ada sebagai pengarah kawalan, pengarah atau pemegang saham syarikat-syarikat perayu-perayu. Rayuan perayu-perayu adalah hanya terhadap perenggan i(d) Perintah Injunksi, iaitu yang menghalang perayu-perayu dari 'menamatkan atau cuba menamatkan, memegang, menangguhkan dan/atau menyekat dengan apa cara sekalipun gaji bulanan, fee, perbelanjaan, hak-hak, faedah-faedah yang dimanfaati oleh atau diberi kepada responden, selaku pengarah kawalan atau pengarah atau pemegang saham, setakat yang berkenaan'. Isu penting yang perlu diputuskan adalah sama ada responden telah membuktikan kesnya untuk suatu Perintah Injunksi sementara menunggu perbicaraan, berdasarkan kriteria yang dibentangkan di dalam kes *American Cyanamid Co v. Ethicon*.

Diputuskan (menolak rayuan)
Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah:

(1) Gaji bulanan, fee, perbelanjaan, hak-hak dan faedah-faedah responden nampaknya melangkaui gaji yang dibayar dalam hubungan majikan-pekerja biasa, mengambilkira dakwaan responden di dalam afidavit-afidavit yang diikrarkan pada 10 Julai 1995 dan 4 Oktober 1995 bagi menyokong saman dalam kamarnya untuk injunksi interlokutori. Berikutan itu, gantirugi bukanlah remedi yang mencukupi, terutama dengan menimbang pengataan responden di dalam afidavit yang diikrarkan pada 10 Julai 1995. Kebenaran pengataan di dalam afidavit-afidavit responden, termasuk pengataan bahawa syarikat-syarikat adalah diperbadankan bagi tujuan penjimatan cukai dan untuk menampung dan/atau mengambil-alih aktiviti perniagaan perkongsian jika perlu, dan bahawa ekuiti pegangan

saham di antara responden dan perayu pertama di dalam syarikat-syarikat adalah atas dasar sama rata dan selaras dengan ekuiti pegangan-pegangan saham mereka di dalam perkongsian, adalah isu-isu yang perlu ditangani pada perbicaraan. Begitu juga, penyangkalan atau hujah perayu di dalam afidavit, termasuk hujah bahawa responden tidak mengambil bahagian dalam perniagaan syarikat-syarikat atau telah melanggar tanggungjawab fidusiarinya sebagai pengarah, adalah perkara-perkara yang perlu ditangani di perbicaraan.

(2) Rungutan perayu-perayu bahawa perenggan i(d) Perintah Injunksi amat memprejudiskan perayu-perayu dan terlalu membebankan mereka dan bahawa mereka terpaksa mematuhinya bagi mengelakkan prosiding komital telah diperbesar-besarkan, memandangkan bahawa Perintah Injunksi hanyalah bagi menjaga *status quo*. Selain itu, rungutan atau keperihatinan perayu-perayu telah pun ditangani di dalam perenggan i(f) Perintah Injunksi, iaitu, bahawa 'perintah hendaklah tidak melarang, menghalang atau menyekat defendan-defendan dari membuat bayaran-bayaran dalam urusan-urusan biasa perniagaan'. Isu gantirugi bagi mana-mana kerugian atau ketidakselesaan yang mungkin dialami oleh perayu-perayu berkemungkinan akan ditangani, jika, di akhir perbicaraan, hakim mendapati bahawa Perintah Injunksi tidak seharusnya diberikan. Pada masa itu, terpulanglah kepada responden untuk membangkitkan hujahnya bahawa perayu-perayu, melalui pembelaan mereka bertarikh 3 Ogos 1995, telah secara berkesannya bersetuju untuk menyambung pembayaran gajinya tanpa perlu kepada perintah sekatan. Bagi maksud rayuan, gantirugi bukanlah remedi yang mencukupi. Jika masih ada keraguan, maka neraca keselesaan adalah berpihak kepada responden, terutama apabila surat perayu kedua bertarikh 3 Julai 1995 yang memberitahu bahawa pembayaran gaji dan semua perbelanjaan akan diberhentikan bermula dari 1 Julai 1995 tidak memberi sebarang sebab baginya.

(3) Responden, dengan itu, telah membuktikan kesnya untuk suatu injunksi interim menurut terma-terma Perintah Injunksi, sementara menunggu perbicaraan perkara-perkara yang dipertikaikan.

Case(s) referred to:
American Cyanamid Co v. Ethicon [1975] 1 All ER 504 ***(foll)***
Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong [1993] 1 CLJ 9 SC ***(refd)***

For the appellants - Wong Chong Wah (Lim Koon Huan & Elaine Ho with him); M/s Skrine
For the respondent - JA Yeoh; M/s Shearn Delamore & Co

[Appeal from High Court, Pulau Pinang; Suit No: 22-159-1995]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:

[1] The appellants' appeal arises from an order of injunction dated 21 December 1995 obtained by the respondent restraining the appellants from, amongst other things, determining his authority, powers, rights, entitlements, interests, benefits and privileges whether as governing director, director or shareholder of the appellant companies and from transferring and/or disposing of the assets and funds of the appellants.

[2] The background to the appeal is as more particularly set out in my grounds of judgment in the matter under Court of Appeal Civil Appeal No. P-02-434-2005 between the respondent herein as appellant and the appellants herein as respondents arising from the decision of the High Court after a full trial.

[3] For completeness and with a view to understanding the issues, I reproduce the text of the order of injunction granted on 21 December 1995 restraining the appellants as follows, namely:

(a) convening or attempting to convene any directors' meetings and/or any ordinary or extra-ordinary general meetings to determine the authority, powers, rights, entitlements, interests, benefits and privileges of the Plaintiff whether as governing director, director, shareholder or otherwise;

(b) acting or continuing to act on any of the resolutions which may have been passed at any directors' meetings and/or any ordinary or extra-ordinary general meetings having the effect

A of terminating or curtailing the authority, powers, rights, entitlements, interests, benefits and privileges of the Plaintiff whether as governing director, director, shareholder or otherwise;

B (c) acting or continuing to act on the resolutions passed at any of the directors' meetings of the Defendants rescinding the resolutions pertaining to the mandate of the Plaintiff as a signatory of the Defendants' bank accounts and substituting and/or appointing in place of the Plaintiff any name or names as signatory or signatories of the Defendants' bank accounts;

C (d) terminating or attempting to terminate, withholding, withdrawing, suspending and/or curtailing in any way the monthly salary, fee, expenses, entitlements and benefits enjoyed by or due to the Plaintiff as governing director, director and/or as shareholder as the case may be;

D (e) removing or evicting the Plaintiff from and/or disturbing, threatening or harassing in any way the Plaintiff's enjoyment and/or occupation of his office at the 2nd Defendant's place of business at No. 2465, Tingkat Perusahaan 6, Kawasan Perusahaan Prai, 13600 Prai, Province Wellesley and/or other E facilities incidental thereto;

(f) transferring and/or disposing of any of the assets of the Defendants and/or transferring or disposing of any of the funds or monies of the Defendants whether for the purposes of fixed deposits with banks of financial institutions or for F the purposes of the directors' and/or shareholders' current accounts with or in the Defendants save that the order herein shall not prohibit, restrain or restrict the Defendants from effecting payments in the ordinary course of business;

G (g) appointing any further directors and/or creating any new shareholders and granting, conferring and declaring any dividends, rights, interests, privileges and benefits other than to the Plaintiff and the 1st Defendant as the governing directors and as shareholders of the Defendants; and

H (h) taking, continuing, directing or suffering to be taken or continued any steps or actions with a view to passing, effecting or enforcing any resolutions for the purposes of and/or which may have the effect of terminating or curtaining the authority, powers, rights, entitlements, interests, benefits and privileges of the Plaintiff whether as governing director, I director, shareholder or otherwise.

[4] The appellants' appeal is only against para i(d) of the said order of injunction, ie, restraining the appellants from 'terminating or attempting to terminate, withholding, withdrawing, suspending and/or curtailing in any way the monthly salary, fee, expenses, entitlements, benefits enjoyed by or due to the respondent, as governing director, director, shareholder or otherwise, as the case may be'.

[5] The appellants have at the outset taken the point that the appeal is academic as the High Court had on 18 March 2005 dismissed the respondent's claims completely and had dissolved the said order of injunction. With respect, I do not think that the appeal is academic, merely because the High Court had dismissed the respondent's claims completely and had, in the course of doing so, dissolved the said order of injunction. As the appeal had not been withdrawn, I am therefore constrained to hear the appeal.

[6] For the purposes of the appeal, I hold that the validity or propriety of the said order of injunction must be determined in the context of the circumstances and issues raised at the time of the *inter parte* hearing of the respondent's summons in chambers (encl. 3) for an order of injunction against the appellants pending trial of the matter. The essential issue to be determined is whether the respondent had made out and established his case for an order of injunction pending trial following the criteria as laid down in the case of *American Cyanamid Co v. Ethicon* [1975] All ER 504.

[7] Although the appeal record does not contain nor have I been referred to any grounds of judgment in respect of the said order of injunction, I am satisfied, having perused the record of appeal, that the High Court Judge, in granting the said order of injunction, was similarly satisfied that the respondent had met the criteria as laid down in the case of *American Cyanamid Co v. Ethicon* [1975] 1 All ER 504. I am satisfied in particular that there is a real apprehension on the part of the respondent that he would suffer irreparable damage, if steps had not been taken to preserve the *status quo*, having regard to the following, in particular:

(i) the directors' resolution of the 2nd appellant dated 17 October 1994 requiring the respondent and the 1st appellant to execute several deeds of trust in respect of the trade marks registered in the names of the 1st appellant and the respondent in favour of the 2nd appellant;

(ii) the letter of 30 November 1994 from the 2nd appellant terminating summarily the employment of Soo Li Lih, the daughter of the respondent, as executive officer, 'due to certain unforeseen circumstances';

(iii) the directors' resolutions of the appellant companies passed on 27 May 1995 rescinding, in effect, the respondent's mandate as a signatory of the companies' bank accounts; and

(iv) the letter dated 3 July 1995 from the 2nd appellant informing the respondent that payments of salary and all other expenses shall cease with effect from 1 July 1995.

[8] It is the appellants' contention that para i(d) of the said order of injunction is akin to a monetary order compelling the appellants to pay the respondent his monthly salary pending the outcome of the respondent's case and that, therefore, damages would have been the sole and adequate remedy for the respondent.

[9] I have considered the arguments raised and am of the view that the respondent's monthly salary, fees, expenses, entitlements and benefits would appear to extend beyond salaries or wages payable in a strictly employer-employee relationship having regard to the respondent's assertions on affidavits affirmed on 10 July 1995 and 4 October 1995 in support of his summons in chambers for an interlocutory injunction as follows:

(i) that the companies were in fact incorporated for purposes of tax-savings and to complement or take over, if need be, the business of the partnership of Soo Chew Trading set up between the 1st appellant and the respondent as partners;

(ii) that though the partnership had in 1989 ceased business and that since then, the 2nd appellant had assumed the goodwill and business of the said partnership, the companies had at all times been funded essentially from the income and profits of the partnership;

(iii) that the respondent as chairman and director is entitled to a monthly salary and to various other benefits, both personal and household, from the 2nd appellant *in lieu* of dividends in respect of the respondent's shares in the companies; and

(iv) that the respondent is a governing director of the companies, with all powers and privileges as provided for under the Articles of Association of the companies, including the right to give any directions in relation to the companies' businesses and the right to hold office until death or resignation.

[10] Consequentially, I do not think that damages would be an adequate remedy, more so, in view of the respondent's assertions on affidavit affirmed on 10 July 1995 as follows:

(i) that the respondent had been instrumental in building, developing and promoting the business, goodwill and name of the 2nd appellant as traders and/or manufacturers of infant products;

(ii) that the appellants' moves to force or induce a curtailment or termination of the respondent's authority, powers, rights, entitlements, interests, benefits and privileges, whether as governing director, director, shareholder or otherwise, were motivated primarily to secure and entrench the position of the 1st appellant and his family members at the respondent's expense and to the detriment of the respondent's position in the companies; and

(iii) that the 1st appellant had caused the companies to limit the salary and benefits due to the respondent as shareholder and had diverted or channeled the dividends and profits which would otherwise be payable to the respondent as shareholder to various directors and/or shareholders' current accounts with or in the companies for the benefit of the 1st appellant and his family members and with the intention of securing the positions of the 1st appellant and his family members as shareholders or otherwise.

[11] The truth or veracity of the assertions on affidavits on the part of the respondent, including the assertions that the companies were incorporated for the purposes of tax savings, and to complement and/or take over, if needed be the business activities of the partnership and that the share equity in the companies as between the respondent and the 1st appellant shall be on an equal basis consistent with their shares in the partnership, are strictly issues to be addressed at the trial. Likewise, the denials or

A contentions of the appellants on affidavits, including the contentions that the respondent had not been taking any part in the business of the companies or had breached his fiduciary duty as a director, are matters to be addressed at the trial.

B **[12]** The appellants' complaint that para i(d) of the said order of injunction is highly prejudicial to and onerous on the appellants and their compliance under threat of committal proceedings would appear to have been exaggerated, given the fact that the said order of injunction is intended to preserve the *status quo*. Besides, C the appellant's complaint or concern had incidentally been addressed in para i(f) of the said order of injunction, ie, that 'the order shall not prohibit, restrain or restrict the defendants from effecting payments in the ordinary course of business'.

D **[13]** The issue of damages for any injury or inconvenience that may have been suffered by the appellants, may have to be addressed, if at the conclusion of the trial, the judge should find that the said order of injunction ought not to have been granted. It would then be up to the respondent to argue his contention E that the appellants had by their defence dated 3 August 1995 agreed in effect to resume payment of his salary without the need for a restraining order.

[14] For purposes of the appeal, it is my finding that damages would not be an adequate remedy. If, at all, there is any doubt, F the balance of convenience would nonetheless appear to favour the respondent, more so, when no reason had been stated in the very letter dated 3 July 1995 from the 2nd appellant informing that payment of salary and all other expenses shall cease with effect from 1 July 1995.

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[15] In *Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong* [1993] 1 CLJ 9, the Supreme Court cited Lord Diplock's judgment in *American Cyanamid v. Ethicon* appearing at p. 17 as follows:

H > It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial …

I

[16] On what should be taken into account in determining the balance of convenience, Lord Diplock in *American Cyanamid v. Ethicon* had this to say:

> It would be unwise even to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

[17] In the circumstances, I am satisfied that the respondent had made out his case for an interim injunction in the terms of the said order of injunction dated 21 December 1995 pending trial of the matters in dispute.

[18] The fact that the hearing of the appeal had come up after the conclusion of the trial proper and the dismissal of the respondent's case completely should not, in my view, affect at all the essential issue whether the respondent was indeed entitled to an injunction pending trial of the matters in dispute.

[19] For the reasons as stated, it is my finding that there is no merit in the appeal. The appeal is hereby dismissed with costs and the deposit for the appeal to be paid to the respondent towards account of taxed costs.

[20] My learned brothers, Datuk Wira Low Hop Bing JCA and Datuk Suriyadi Halim Omar JCA, have read this judgment in draft and have expressed their agreement with it.